Dec. 2 1874. Filed

Fuld 20-560

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~373.~~ 93

THE FRANKLIN FIRE INSURANCE COMPANY,
PLAINTIFFS IN ERROR,

vs.

SAMUEL C. COLT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED DECEMBER 14, 1872.

DEC 21 1874

Dec. 2 1874. Filed

Filed 20-560

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~373.~~ 93

THE FRANKLIN FIRE INSURANCE COMPANY,
PLAINTIFFS IN ERROR,

vs.

SAMUEL C. COLT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED DECEMBER 14, 1872.

DEC 21 1874

SUPREME COURT OF THE UNITED STATES.

No. 373.

THE FRANKLIN FIRE INSURANCE COMPANY,
PLAINTIFFS IN ERROR,

vs.

SAMUEL C. COLT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	1
Acknowledgment of service	4	1
Return of circuit court	5	2
Original writ	6	2
Officer's return of service	23	8
Petition for removal from State court	24	8
Order for removal from State court	26	9
Plea	28	10
Verdict	29	10
Judgment	30	11
Bill of exceptions	30	11
Petition for writ of error	43	14
Bond	44	14
Authentication	46	15

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the second circuit and district of Connecticut, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Samuel C. Colt and the Franklin Fire Insurance Company, a manifest error hath happened, to the great damage of the said Franklin Fire Insurance Company, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the
2 same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court, this 29th day of November, in the year of our Lord one thousand eight hundred and seventy-two.

LOREN P. WALDO,
Clerk of the Circuit Court of the United States for the District of Connecticut.

Allowed by—

W'M D. SHIPMAN,
Judge.

3 The United States of America to Samuel C. Colt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, wherein the Franklin Fire Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Hartford, in said district, this 29th day of November, A. D. 1872.

[SEAL.]

W'M D. SHIPMAN,
Judge.

4 Due and legal service of the within and foregoing citation is hereby acknowledged; and I hereby agree that the said writ may be entered at any time in the docket of the term of the court to which the same is returnable.

SAMUEL C. COLT,
By HUBBARD & ROBINSON,
His Attorneys.

HARTFORD, *Nov.* 29, 1872.
REC. 373—1

The answer of Salmon P. Chase, Chief Justice of the Supreme Court of the United States, to the foregoing writ:

The record and process, whereof mention is therein made, follow in these words, to wit:

5 SAMUEL C. COLT
vs.
THE FRANKLIN FIRE INSURANCE COMPANY.

Be it remembered that heretofore, on the 13th day of January, there was filed in this court the record of a cause, in the words and figures following, to wit:

6 To the sheriff of Hartford County and his deputy, and to the sheriff of New Haven County, his deputy, and to either constable of the town of Waterbury, in said New Haven County, greeting:

By authority of the State of Connecticut, you are hereby commanded to attach, to the value of fifteen thousand dollars, the goods or estate of the Franklin Fire Insurance Company, a corporation organized under the laws of the State of Pennsylvania, and having their principal office at the city of Philadelphia, and capable of suing and being sued, and doing business in the State of Connecticut, as an insurance company, according to the laws of this State, and having agents within this State, and an attorney for the service of process, viz, John W. Smith, of Waterbury aforesaid; and then summon them to appear before the hon. superior court for the county of Hartford, next to be holden at Hartford, within and for said county, on the third Tuesday of December, A. D. 1870, then and there to answer unto Samuel C. Colt, of the city
7 and county of Hartford aforesaid, in a plea of the case.

Whereupon the plaintiff declares and says, that the defendants are a body corporate and politic, incorporated by the laws of the State of Pennsylvania, and with authority from the State of Connecticut to do business in said State of Connecticut, as a fire insurance company, with power to sue and be sued, particularly with power in this State to insure buildings and other property against loss or damage by fire;

And that the defendants, on the 26th day of August, A. D. 1870, executed and delivered to the plaintiffs a certain instrument in writing commonly called a policy of insurance, of the form following, to wit:

This policy of insurance witnesseth, that the Franklin Fire Insurance Company of Philadelphia have received of Samuel C. Colt, of the city of Hartford, two hundred and fifty-nine $\frac{34}{100}$ dollars premium for insuring, according to their printed proposals and conditions hereunto annexed, upon the property herein described, viz:

$3,333\frac{1}{3}$ on his frame main barn building known as No. 1,
8 (meaning No. 1 in defendants' surveys,) situate on his farm in the town of Farmington, Conn.

$666\frac{2}{3}$ on his hay, grain, feed, and straw contained therein.

$3,333\frac{1}{3}$ on cows contained therein, in case of loss, no one cow to be valued over $300.

$500 on mules contained therein, in case of loss, no one mule to be valued over $400.

$333\frac{1}{3}$ on frame building occupied as a carriage-house, granary, and chickens'-house, situate detached from main buildings, and known as No. 2, (meaning No. 2 in defendants' survey.)

$133⅓ on carriages and wagons contained therein.
$100 on fowls contained therein.
$400 on frame barn building No. 3, (meaning No. 3 in defendants' survey,) situate detached from main buildings.
$500 on farming utensils contained therein.
$333⅓ on live stock contained therein.
$66⅔ on frame building No. 4, (meaning No. 4 in defendants' survey,) adjoining main barn, occupied as an engine-house.
$333⅓ on engine, boiler, shafting, belting, and pulleys contained therein.
$333⅓ on frame building No. 5, (meaning No. 5 in defendants' survey,) adjoining building No. 4, occupied as a cider-mill.
9 $6⅔ on cider-mill and press contained therein, other insurance permitted without further notice.
5 years from Aug. 26, 1870, *a* 2½ %.

Now know all men by these presents, that in consideration thereof, the capital stock, estate, and securities of the Franklin Fire Insurance Company of Philadelphia shall be subject and liable to pay, make good, and satisfy, unto the said insured, his heirs, executors, administrators, or assigns, all such damage or loss which shall or may happen by fire to the property above mentioned, from the 26th day of August, A. D. 1870, to the full end and term of five years therefrom, and also for the full end and term of any future time or times, for which a premium of insurance shall be paid and endorsed on this policy, or otherwise acknowledged in writing by the secretary, or other authorized officer of the said corporation for the time being, not exceeding the sum of ten thousand three hundred seventy-five dollars, or such other sum or sums as by such endorsement or written acknowledgment shall at any future time or times aforesaid be assumed by the
10 said corporation, unless the said company shall, within sixty days after the proof of such damage or loss, give directions for restoring said property, if building, or buildings, to as good condition as it or they shall have been in immediately before being so injured by the fire; or if merchandise or other personal property, shall furnish the said insured with a like quantity of any or all said goods, and of the same quality as those so injured by fire, or shall make good the damage or loss by paying therefor the true and actual cash value at the time the loss shall happen, according to the estimate thereof, to be made by arbitrators indifferently chosen, whose award in writing shall be conclusive and binding upon all parties, provided that if the premises above mentioned shall, at any time when such fire shall happen, be, in whole or in part, occupied for purposes considered more hazardous in the printed proposals and conditions hereunto annexed than at the time of making such insurance, except liberty so to occupy them be expressly stipu-
11 lated for, by writing as aforesaid, this policy and every clause, article, and thing therein contained shall be void and of no effect, nor shall this policy have any force or effect if assigned, unless such assignment be made within thirty days after the transfer of the property, and allowed by the company, agreeable to article 3 of the proposals annexed.

It is agreed that this policy shall expire at twelve o'clock at noon on the 26th day of August, A. D. 1875, unless continued by endorsement, or acknowledgment as aforesaid, and then at the time shall expire, according to the tenor of said endorsement or acknowledgment.

This policy shall not be valid until countersigned by Nevers & Havens, agents of the said Franklin Insurance Company of Philadelphia in Hartford.

In witness whereof the Franklin Fire Insurance Company have caused these presents to be signed by their president, and attested by their secretary, in the city of Philadelphia, Pennsylvania.

ALFRED G. BAKER,
President.
J. W. McALLISTER,
Secretary.

Countersigned at Hartford this 26th day of August, A. D. 1870.
12 NEVERS & HAVENS,
Agents.

Endorsed:

Conditions of insurance.

I. Persons desirous of making insurance required to give certain items of information;
De effect of misrepresentation.
De renewals.
De separate insurance of several buildings.
II. De property held in trust.
De goods in storage.
De qualified interest.
III. De assignment.
IV. De invasion, foreign enemy, &c.
V. De books of account.
VI. De jewels and expensive items.
VII. De notice of additional insurance.
VIII. De payment of premiums.
IX. Persons sustaining loss or damages by fire shall forthwith give notice thereof, in writing, to the company, and, as soon after as possible, they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands.
De certain forms of proof, when required, in writing.
When merchandise or other personal property is partially dam-
13 aged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged goods, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind.
The amount of damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers mutually agreed npon.
De certain proofs, when required, in writing, and until such proofs, declarations, and certificates are produced, and such appraisals and examinations of property permitted by the claimant, as required, the loss shall not be payable.
De effect of fraud.
X. De option of company to rebuild and replace, upon their notice, within twenty days after proof.
De arbitration or written request.
XI. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, without any deduction whatever.

XII. De effect of levy, &c.
XIII. De limitation of suits to six years from date of fire.
14 XIV. De lightening, camphene, &c.
XV. De insurance of rents.
XVI. De classification of risks and hazards.

And the plaintiff says that said policy is in the possession of the defendant, and that they have refused and refuse to give it up to the plaintiff, and therefore that he is unable to set out the same literally, but that the foregoing is its form, for substance.

And in consideration that the plaintiff, on said 26th day of August, A. D. 1870, assumed and faithfully promised the defendants that he would perform all the stipulations and agreements in said instrument on his part to be performed, they, the defendants, on said day last aforesaid, assumed and faithfully promised the plaintiff to perform all the stipulations and agreements in said instrument on their part to be performed.

The plaintiff further says that on said 26th day of August, A. D. 1870, he paid to the defendants the said sum of two hundred and fifty-nine $\frac{34}{100}$ dollars, being the premium of insurance in said instrument specified.

15 The plaintiff further says that the said buildings and chattels in said policy specified, being the property of the plaintiff, were, on the 20th day of September, A. D. 1870, accidentally and without the fault of the plaintiff, burned up and entirely consumed by fire, and were wholly lost to the plaintiff; that the value of the property so destroyed was more than thirty-five thousand dollars.

He further says that he forthwith, viz, on the 21st day of September, A. D. 1870, and again in writing on the 29th day of September, A. D. 1870, gave notice to defendants of said loss; and as soon as possible, viz, on the 29th day of September, A. D. 1870, delivered to the defendants a particular account of the loss by him sustained, by the destruction of said property, signed with his hand and verified by oath in due form administered by Henry C. Robinson, esquire, justice of the peace in and for the county of Hartford.

The plaintiff further says that he has complied with and performed all the conditions of said policy, on his part to be done and performed, whereby the defendants became liable to pay, and in consideration thereof assumed and promised the plaintiff to pay to him, said sum of ten thousand three hundred and seventy-five dollars when thereto requested.

16 Yet the defendants, their said promise not regarding, have never paid the same, but have wholly neglected and refused so to do; to the damage of the plaintiff eleven thousand dollars.

Second count.—And the plaintiff further says that the defendants, on the 26th day of August, A. D. 1870, by their certain policy of insurance, so called, of that date, made, executed, and delivered to the plaintiff, in consideration that the plaintiff then and there agreed to pay to the defendants a certain fixed premium, viz, the sum of two hundred and fifty-nine $\frac{34}{100}$ dollars, and to occupy the premises hereinafter mentioned in no manner more hazardous than the then present occupancy of said premises, undertook and promised the plaintiff to insure him, for the period of five years from August 21st, A. D. 1870, against loss and damage by fire, to the amount of ten thousand three hundred and seventy-five dollars, to the items of property specified in the first count of this declaration, and to the amounts per article specified in said preceding count, which items of property, being buildings and chattels belonging

to the plaintiff, were situated in Farmington, in Hartford County, and were of the value of fifty thousand dollars.

17 And in consideration of the said agreement of the plaintiff, and of the said premium to be paid, the defendants undertook and promised that their capital stock, estate, and securities should be subject and liable to pay, make good, and satisfy unto the plaintiff and his representatives all such damage and loss which should happen by fire to said property from the 26th day of August, A. D. 1870, to the 26th day of August, A. D. 1875, not exceeding the sum of ten thousand three hundred and seventy-five dollars, unless the defendant should, within sixty days after the proof of such damage or loss, give directions for restoring the said buildings and furnishing a like quantity of said chattels of equally good quality to the plaintiff, or unless they, the defendants, should make good the said loss or damage by paying the true cash value of the said property insured, at the time of the fire, according to the award, in writing, of arbitrators to be indifferently chosen.

And the plaintiff says that, on the 20th day of September, A. D. 1870, the said property of the plaintiff was accidentally and without fault of the plaintiff wholly destroyed and consumed by fire.

18 And the plaintiff further says that, on said 26th day of August, A. D. 1870, he paid to the defendants the said sum of two hundred fifty-nine $\frac{34}{100}$ dollars, premium as aforesaid, and that the said premises have not been occupied by any occupancy more hazardous than their occupancy of said 26th day of August, A. D. 1870.

And the plaintiff further says that, on the 20th day of September A. D. 1870, immediately after said fire, he gave notice of said loss to the defendants, and immediately afterward, to wit, on the 29th of said September, he, the plaintiff, gave to the defendants a precise and detailed account and proof of his loss by said fire, and of the damage and loss thereby caused to the said items of property by the defendants insured.

And the plaintiff says although sixty days have elapsed since the furnishing to the defendants of such proof and account of loss and damage, and although the plaintiff has done all and singular the agreements and conditions by him to be performed, as required by said policy of insurance, yet the defendant has not given any directions for the restoration of said buildings, nor has the defendant replaced and furnished to the plaintiff any articles of property and chattels like those of the plaintiff by said fire destroyed and damaged, nor has the

19 defendant paid to the plaintiff the amount of the cash value of said property, at the time of said fire, as awarded by any arbitrators.

Whereby the defendants became liable to pay, and, in consideration thereof, on the 2d day of December, promised the plaintiff to pay to him, when thereto thereafter requested, the sum of ten thousand three hundred and seventy-five dollars. And the plaintiff says that the defendants, their said promise not regarding, have not fulfilled the same, nor any part thereof, though often thereto requested, to his damage eleven thousand dollars.

3d count. And the plaintiff further says that heretofore, viz, on the 20th day of August, A. D. 1870, the defendants were doing business, according to law, as an insurance company chartered by the laws of another State, and doing business within this State; and that, on the day last named, he, the plaintiff, was absolute owner of five certain buildings and of certain items of personal property beside', viz, two hundred tons of hay, two hundred tons of grain and straw, three carriages, two

wagons, four sleighs, fourteen cows, two mowing-machines, ten reapers, ten raking-machines, ten ploughs, and forty other farming implements,
20 one cider-mill and press, one engine, one boiler and shafting, all being in said Farmington, and of the value of fifty thousand dollars; and that the defendants, on the day and year last aforesaid, in consideration that the plaintiff then undertook and agreed to pay to the defendants on the 1st day of October, A. D. 1870, the sum of two hundred and fifty-nine $\frac{34}{100}$ dollars, as an insurance premium, undertook and agreed to insure and did insure the plaintiff against loss or damage to said property and to any of it, to the amount of ten thousand three hundred and seventy-five dollars, distributed over said articles in the manner and to the extent particularly set forth in the first count of this declaration, for the term of five years from the said 26th day of August, A. D. 1870.

And the plaintiff says that on the 20th day of September, A. D. 1870, said buildings and all said chattels were destroyed by fire, accidentally and without fault of the plaintiff, the said property then being the estate of the plaintiff, and to his damage and loss more than thirty-five thousand dollars.

And the plaintiff says that immediately afterwards, viz, on the 21st day of September, A. D. 1870, plaintiff gave notice of said loss to
21 defendant, and afterwards, on the 29th day of September, plaintiff gave particular account and proof of his loss to defendants.

And plaintiff says that on said 1st day of October the plaintiff offered to pay the defendants said two hundred and fifty-nine $\frac{34}{100}$ dollars premium as aforesaid, but defendants refused to receive the same, and have ever since refused to receive it, although plaintiff has been at all times ready and willing to pay the same.

And the plaintiff further says that thereby the defendants became liable to pay to the plaintiff the sum of ten thousand three hundred and seventy-five dollars, and thereupon, in consideration thereof, on the second day of December, A. D. 1870, undertook and faithfully promised to pay the plaintiff ten thousand three hundred and seventy-five dollars when thereto requested; but the plaintiff says that defendant, his said promise not regarding, has never paid the same, though thereto often requested, to his damage eleven thousand dollars.

And the plaintiff further says that the defendants, on the 2d day of December, A. D. 1870, were indebted to the plaintiff in the fur-
22 ther sum of eleven thousand dollars, for so much money before that time had and received by the defendants to and for the use of the plaintiff.

And also in the further sum of eleven thousand dollars for so much money before that time paid, laid out, and expended by the plaintiffs for the defendants, at the special instance and request of the defendants.

And also in the further sum of eleven thousand dollars for so much money before that time lent and advanced to the defendants by the plaintiff, at the special instance and request of the defendants.

And also in the further sum of eleven thousand dollars, for goods, wares, and merchandize before that time sold and delivered to the defendants by the plaintiff, at the special instance and request of the defendants.

And also in the further sum of eleven thousand dollars for so much money found to be due from the defendants to the plaintiff, upon an account then and there stated between them.

And also in the further sum of eleven thousand dollars for work and

and labor done and performed by the plaintiff for the defendants, at the special instance and request of the defendants; and being so in-
23 debted, the defendants afterwards, to wit, on the day and year last aforesaid, at Hartford aforesaid, in consideration thereof, undertook and faithfully promised the plaintiff to pay to him said several sums of money when they should be thereto afterwards requested.

Yet the plaintiff says that the defendants, their said several promises aforesaid not regarding, have never performed the same, though often requested and demanded; all of which is to the damage of the plaintiff the sum of twelve thousand dollars.

And for recovery thereof, with just costs, the plaintiff brings this suit.

Plaintiff is recognized in the sufficient sum of $150 to prosecute, &c.

Hereof fail not, but of this writ, with your doings thereon, make due return according to law.

HENRY C. ROBINSON,
Justice of the Peace.

NEW HAVEN COUNTY, *ss:*

WATERBURY, *December 7th*, 1870.

Then I left a true and attested copy of the writ with John W. Smith, agent and attorney for this State of the within-described defendants.

Attest:

WESTELL RUSSELL,
Deputy Sheriff of New Haven County.

Fees:

Travel	6 00
Copy	4 00
Service	12
	$10 12

24 To the hon. superior court of the State of Connecticut, now in session at Hartford, in and for the county of Hartford, in said State, at the term thereof commencing on the third Tuesday of December, A. D. 1870.

The petition of the Franklin Fire Insurance Company of Philadelphia, in the State of Pennsylvania, respectfully represents:

That the petitioner is a corporation created under and by virtue of the laws of the State of Pennsylvania, located and doing business and having its principal office and place of business at the city of Philadelphia, in said State of Pennsylvania, and is a citizen and resident of the State of Pennsylvania, and is not a citizen of the State of Connecticut; and further that an action has been commenced against your petitioner, by a certain action at law brought to the present term of this court, in which action Samuel C. Colt, a resident of and citizen of the said State of Connecticut is plaintiff, and your petitioner is defendant; which suit is now pending,

That the matter in dispute and the amount in controversy in said action exceeds the sum of five hundred dollars exclusive of costs, as will more fully appear by the writ and declaration in said action now on file.

25 And your petitioner shows that the date hereof is the day and time for entering an appearance in its behalf in said action, and that the same is undetermined by default of your petitioner or otherwise.

And your petitioner represent that they desire to remove the said

action, and all the allegations, pleadings, and proceedings arising thereon into the honorable circut court of the United States for the second circuit in the district of Connecticut, according to the laws of the United States in that behalf.

Wherefore, at the time of entering an appearance before this court, they prefer this petition to this court, and pray for the removal of said cause for trial into the next circuit court to be holden in and for the district of Connecticut, to wit, into the circuit court of the United States for the second circuit, at its term next to be holden in the town and county of New Haven, on the fourth Tuesday of April, A. D. 1871, and the said defendant is prepared to offer and hereby does offer for the acceptance of this court good and sufficient surety for his entering in said circuit court, on the first day of its session at said April term, copies of said protest against him, and *and* doing all other and
26 further things, for the performance of which the laws of the United States require a petitioner for the removal of a cause into said circuit court to give good and sufficient security.

Dated at Hartford, this 20th day of December, A. D. 1870.

Franklin Fire Insurance Company—

By their attorney,
N. SHIPMAN.

At a superior court holden at Hartford, within and for the county of Hartford, in the State of Connecticut, on the third Tuesday of December, A. D. 1870:

Present, honorable Dwight W. Pardee, judge.

The above and foregoing petition is granted, and the cause described therein is removed into the United States circuit court next to be holden at the city and county of New Haven, within and for the second circuit, at its term commencing on the fourth Tuesday of April, A. D. 1871; and Nathaniel Shipman, esq., recognized in the sum of two hundred dollars, conditioned that the defendant shall enter copies of the process in this case in said United States circuit court for the second circuit, at its session next to be holden at New Haven, on the fourth Tuesday of April, A. D. 1871, on the first day of said session.

27 STATE OF CONNECTICUT,
County of Hartford, ss:

CLERK'S OFFICE, *Superior Court.*

The within and foregoing is a true copy of the original writ, service, petition to remove, and decree upon said petition in the case of Samuel C. Colt vs. The Franklin Fire Insurance Company.

In testimony whereof I do hereunto subscribe my name and office, and affix the seal of said court, this 28th day of December, A. D. 1870.

[SEAL OF SUPERIOR COURT.] CHAUNCEY HOWARD,
Clerk of the Superior Court.

[5-cent revenue-stamp, cancelled.]

JAN. 5TH, 1871.

STATE OF CONNECTICUT,
County of Hartford, ss:

I, Dwight W. Pardee, a judge of the superior court of said State, now presiding in and for said county, do hereby certify that Chauncey Howard, whose name is subscribed to the above certificate, is clerk of said court for said county; that the seal affixed to the above certificate

is the genuine seal of said court, and that the foregoing attestation is in due form.

DWIGHT W. PARDEE,
A Judge of the Superior Court of the State of Connecticut.

[5-cent rev.-stamp, cancelled.]

28 And at the April term of the said circuit court of the United States, held at New Haven, in and for the second circuit and district of Connecticut, on the fourth Tuesday of April, A. D. 1871, the said cause was duly placed and entered in the docket of said circuit court, and the plaintiff, by Messrs. Robinson and Hubbard, duly appeared, and the defendant, by Messrs. Shipman and Chamberlin, also duly appeared, and said cause was duly continued under the general order to plead.

And at the term of said circuit court holden at Hartford, within and for the district of Connecticut, on the third Tuesday of September, A. D. 1871, the parties again appeared as aforesaid, and the defendants filed their plea in the words and figures following, viz:

Circuit court, September, 1871.

DISTRICT OF CONNECTICUT, *ss:*

SAMUEL C. COLT
vs.
THE FRANKLIN FIRE INS. CO. } Action on the case.

The defendants in court defend, plead, and say that they did not assume in manner and form as the plaintiff in his declaration hath alleged, and for trial thereof put themselves on the jury.

By CHAMBERLIN & SHIPMAN,
Attorneys.

29 To which the plaintiff replied as follows, viz:
And the plaintiff likewise.

By HUBBARD & ROBINSON,
Attorneys.

Wherefore the marshal of the district of Connecticut is commanded that he cause to come here immediately twelve, &c., by whom, &c., and who, &c., to recognize, &c., because as well, &c.

And the jurors of said jury, for this purpose by the marshal impanneled and returned, viz: Emerson S. Cornish, Joseph M. Pierce, John B. Winden, Benjamin F. Stanton 2nd, Alonzo G. Case, Gad Newton, Roger S. Williams, John Walker, John W. Stoughton, Dan. A. Miller, Nathan J. Holt, Andrew Chapman, being called, came; who, being elected, tried, and sworn to speak the truth of and concerning the premises, returned and filed their verdict in words and figures following, viz:

Circuit court, September term, 1871.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

SAMUEL C. COLT
v.
THE FRANKLIN FIRE INS. CO. } Action on the case.

In this case the jury finds the issues for the plaintiff to recover of

trators, jointly and severally, by these presents, sealed with our seals, and dated this 29th day of November, A. D. 1872.

Whereas, lately, at a circuit court of the United States in and for the second circuit and district of Connecticut, in a suit depending in said court between Samuel C. Colt and The Franklin Fire Insurance Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the suit aforesaid, and a citation directed to the said Samuel C. Colt citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such that if the
45 said The Franklin Fire Insurance Company shall prosecute the said writ of error to effect and answer all costs and damages if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered this day and year above written, at Hartford aforesaid.

N. SHIPMAN. [L. S.]
C. C. KIMBALL. [L. S.]

Wherefore said writ of error is allowed to the Supreme Court of the United States, and execution is stayed herein until the coming in of the mandate thereof.

Attest:

LOREN P. WALDO, *Clerk.*

46 I, Loren P. Waldo, clerk of the circuit court of the United States for the district of Connecticut, do certify that the foregoing is a true copy of the original process, pleadings, and proceedings in, and all things concerning, the cause of Samuel C. Colt against The Franklin Fire Insurance Company remaining on file and of record in the said court.

In testimony whereof I have hereto set my name and the seal of said court, at Hartford, in said district, this 30th day of November, A. D. 1872.

[SEAL.] LOREN P. WALDO, *Clerk.*

(Indorsement on cover:) No. 373. The Franklin Fire Insurance Company, plaintiffs in error, vs. Samuel C. Colt. Connecticut. C. C. U. S. Filed 14th December, 1872.

is the genuine seal of said court, and that the foregoing attestation is in due form.

DWIGHT W. PARDEE,
A Judge of the Superior Court of the State of Connecticut.

[5-cent rev.-stamp, cancelled.]

28 And at the April term of the said circuit court of the United States, held at New Haven, in and for the second circuit and district of Connecticut, on the fourth Tuesday of April, A. D. 1871, the said cause was duly placed and entered in the docket of said circuit court, and the plaintiff, by Messrs. Robinson and Hubbard, duly appeared, and the defendant, by Messrs. Shipman and Chamberlin, also duly appeared, and said cause was duly continued under the general order to plead.

And at the term of said circuit c
for the district of Connecticut, on
D. 1871, the parties again appeare
filed their plea in the words and fig

Circuit court, S

DISTRICT OF CONNECTICUT, *ss:*

SAMUEL C. COLT
vs.
THE FRANKLIN FIRE INS. CO. } Ac

The defendants in court defend,
sume in manner and form as the pl
and for trial thereof put themselve
By

29 To which the plaintiff repl
And the plaintiff likewise.
B

Wherefore the marshal of the dis
that he cause to come here immedi
who, &c., to recognize, &c., because
And the jurors of said jury, for
neled and returned, viz: Emerson
Winden, Benjamin F. Stanton 2nd,
S. Williams, John Walker, John W
J. Holt, Andrew Chapman, being ca
and sworn to speak the truth of an
and filed their verdict in words and

DISCREPANCY IN

Or

PAGES MI

And

CANNOT BE

Circuit court, September term, 1871.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

SAMUEL C. COLT
v.
THE FRANKLIN FIRE INS. CO. } Action on the case.

In this case the jury finds the issues for the plaintiff to recover of

trators, jointly and severally, by these presents, sealed with our seals, and dated this 29th day of November, A. D. 1872.

Whereas, lately, at a circuit court of the United States in and for the second circuit and district of Connecticut, in a suit depending in said court between Samuel C. Colt and The Franklin Fire Insurance Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the suit aforesaid, and a citation directed to the said Samuel C. Colt citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such that if the
45 said The Franklin Fire Insurance Company shall prosecute the said writ of error to effect and answer all costs and damages if [illegible] the above obligation to be void;

year above written, at Hartford

N. SHIPMAN. [L. S.]
C. C. KIMBALL. [L. S.]

wed to the Supreme Court of the herein until the coming in of the

LOREN P. WALDO, *Clerk.*

the circuit court of the United ticut, do certify that the forego- rocess, pleadings, and proceed- cause of Samuel C. Colt against remaining on file and of record

set my name and the seal of said s 30th day of November, A. D.

LOREN P. WALDO, *Clerk.*

The Franklin Fire Insurance C. Colt. Connecticut. C. C. U.

Y IN PAGINATION
Or
S MISSING
And
T BE FOUND

is the genuine seal of said court, and that the foregoing attestation is in due form.

DWIGHT W. PARDEE,
A Judge of the Superior Court of the State of Connecticut.

[5-cent rev.-stamp, cancelled.]

28 And at the April term of the said circuit court of the United States, held at New Haven, in and for the second circuit and district of Connecticut, on the fourth Tuesday of April, A. D. 1871, the said cause was duly placed and entered in the docket of said circuit court, and the plaintiff, by Messrs. Robinson and Hubbard, duly appeared, and the defendant, by Messrs. Shipman and Chamberlin, also duly appeared, and said cause was duly continued under the general order to plead.

And at the term of said circuit court holden at Hartford, within and for the district of Connecticut, on the third Tuesday of September, A. D. 1871, the parties again appeared as aforesaid, and the defendants filed their plea in the words and figures following, viz:

Circuit court, September, 1871.

DISTRICT OF CONNECTICUT, *ss:*

SAMUEL C. COLT
vs.
THE FRANKLIN FIRE INS. CO. } Action on the case.

The defendants in court defend, plead, and say that they did not assume in manner and form as the plaintiff in his declaration hath alleged, and for trial thereof put themselves on the jury.

By CHAMBERLIN & SHIPMAN,
Attorneys.

29 To which the plaintiff replied as follows, viz:
And the plaintiff likewise.

By HUBBARD & ROBINSON,
Attorneys.

Wherefore the marshal of the district of Connecticut is commanded that he cause to come here immediately twelve, &c., by whom, &c., and who, &c., to recognize, &c., because as well, &c.

And the jurors of said jury, for this purpose by the marshal impanneled and returned, viz: Emerson S. Cornish, Joseph M. Pierce, John B. Winden, Benjamin F. Stanton 2nd, Alonzo G. Case, Gad Newton, Roger S. Williams, John Walker, John W. Stoughton, Dan. A. Miller, Nathan J. Holt, Andrew Chapman, being called, came; who, being elected, tried, and sworn to speak the truth of and concerning the premises, returned and filed their verdict in words and figures following, viz:

Circuit court, September term, 1871.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

SAMUEL C. COLT
v.
THE FRANKLIN FIRE INS. CO. } Action on the case.

In this case the jury finds the issues for the plaintiff to recover of

trators, jointly and severally, by these presents, sealed with our seals, and dated this 29th day of November, A. D. 1872.

Whereas, lately, at a circuit court of the United States in and for the second circuit and district of Connecticut, in a suit depending in said court between Samuel C. Colt and The Franklin Fire Insurance Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the suit aforesaid, and a citation directed to the said Samuel C. Colt citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such that if the
45 said The Franklin Fire Insurance Company shall prosecute the said writ of error to effect and answer all costs and damages if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered this day and year above written, at Hartford aforesaid.

N. SHIPMAN. [L. S.]
C. C. KIMBALL. [L. S.]

Wherefore said writ of error is allowed to the Supreme Court of the United States, and execution is stayed herein until the coming in of the mandate thereof.

Attest:

LOREN P. WALDO, *Clerk.*

46 I, Loren P. Waldo, clerk of the circuit court of the United States for the district of Connecticut, do certify that the foregoing is a true copy of the original process, pleadings, and proceedings in, and all things concerning, the cause of Samuel C. Colt against The Franklin Fire Insurance Company remaining on file and of record in the said court.

In testimony whereof I have hereto set my name and the seal of said court, at Hartford, in said district, this 30th day of November, A. D. 1872.

[SEAL.] LOREN P. WALDO, *Clerk.*

(Indorsement on cover:) No. 373. The Franklin Fire Insurance Company, plaintiffs in error, vs. Samuel C. Colt. Connecticut. C. C. U. S. Filed 14th December, 1872.

20-560

Supreme Court of the United States,

OCTOBER TERM, 1874.

THE FRANKLIN FIRE INSURANCE CO.,

Plaintiffs in Error,

vs.

SAMUEL C. COLT.

BRIEF FOR DEFENDANT IN ERROR.

R. D. HUBBARD,
H. C. ROBINSON, } *Of Counsel.*

Supreme Court of the United States.

THE FRANKLIN FIRE INSURANCE COMPANY,
Plaintiffs in Error.

vs.

SAMUEL C. COLT,
Defendant in Error.

DEFENDANT'S BRIEF.

At the time of the undertakings on which this suit is founded, the plaintiffs in error (defendants in the original suit) were doing business in the State of Connecticut as a fire insurance company. Nevers & Havens were, and for a long time previous thereto, had been their general agents for the City of Hartford and its vicinity.

As such agents, on the 26th of August, 1870, the said Nevers & Havens, solicited of the defendant (plaintiff in the original suit) an insurance upon his premises, and took his application, examined the property, made a survey

and schedule, and agreed with the defendant upon the terms of a contract of insurance, and there was then completed a parol contract of insurance for the term of five years from said date, at a premium then fixed and agreed to. Credit was given for the payment of the premium till the first of October then next, and it was agreed that a policy should be made and that the agents should keep it in their possession till the first of October, for the convenience of the defendant, he having no safe and convenient place for keeping papers of that character.

The fire occurred on the 20th day of September, without defendant's fault, and proofs of loss were duly made. On the 22d day of Sepember, two days after the fire, the agents, on request of the defendant, filled out in due form a policy in accordance with the terms of the previous contract, but subsequently declined to surrender possession of it until they should have consulted their principals, and finally returned it to their principals. The defendant tendered the premium September 22d, and demanded the policy, and again October 1st, when the premium became due.

A provision in the plaintiffs' charter gives the corporation power to make all manner of fire insurance, and "to perfect such and so many contracts, bargains, agreements, policies and other instruments as shall be necessary, and as the nature of the case shall or may require; and any such contract, bargain, agreement and policy to be made by said corporation shall be in writing or in print, and shall be under the seal of the said corporation, signed by the president, and attested and signed by the secretary or other officer who may be appointed by the president and directors for that purpose."

Upon this state of facts, the evidence being closed, the plaintiffs in error requested the court to instruct the jury as stated in the bill of exceptions (Record, page 12). The

court refused the instructions sought, and in lieu thereof charged the jury that on the uncontradicted evidence in the case the original plaintiff was entitled to a verdict, and the jury rendered a verdict in his favor, in pursuance of the instructions so given, and for the amount agreed to be due if the plaintiffs in error are liable at all.

On exceptions taken and allowed this writ of error is brought.

The errors complained of resolve themselves into the three following:

I.

THAT THE CONTRACT WAS NOT IN WRITING, AND BEING AN UNDERTAKING FOR FIVE YEARS, WAS WITHIN THE STATUTE OF FRAUDS.

The major premise is denied, but admitting it for the purpose of the question, the objection is not well taken, because the contract, though capable of duration for more than one year, is capable of a valid fulfillment within one year, and, in point of fact, was fulfilled within less than one year.

The fire occurred a few days after the contract. The subject of insurance was totally destroyed. By this event, the risk terminated and ripened into a fixed obligation.

Peters *vs.* Westborough, 19 Pick., 364.
Trustees, &c., *vs.* Brooklyn Co., 19 N. Y., 305.
Walker *vs.* Metropolitan Co., 56 Me., 380.

II.

THAT, IN THE NEXT PLACE, A PAROL CONTRACT IS MADE ABSOLUTELY NULL AND VOID BY THE TERMS OF THE PLAINTIFFS' CHARTER.

By the 8th section of said charter, power is given to the corporation "to make, execute, and perfect" all manner of "contracts, bargains, agreements, policies and other instruments" for insurance against fire. "And every such contract, bargain, agreement, and policy to be made by the said corporation shall be in writing or in print, and shall be under the seal of said corporation, signed by the president and attested and signed by the secretary or other officer, who may be appointed by the president and directors for that purpose."

(I.)—*This language, we insist, is directory and not mandatory*, because—

First. The prescription of the charter is one of *form* and not of *substance*, and does not declare void any act or contract not executed in conformity to the prescription or make the prescription a condition precedent.

"There is a known difference between circumstances which are of the *essence* of things required to be done by an act of parliament and things merely *directory*."

Per Mansfield, in Rex *vs.* Loxdale, 1 Burr., 447.

"Statutes directing the *mode of proceedings* by public officers have always been treated as advisory, and not intended to invalidate the validity of the proceedings themselves, *unless expressly so provided*."

Holland *vs.* Osgood, 8 Vt., 280.
People *vs.* Cook, 14 Barb., 290.
S. C., 4 Selden, 89.

"Statutes intended to promote *method, system, uniformity*, in modes of proceedings are directory."

Torrey *vs.* Millbury, 21 Pick., 67.

Sedgwick on Statutory Law, 368.

So also in case of a parliamentary commission organized under a statute of parliament, which provided that "all contracts" (made by the commission) "shall specify the work to be done, and prices to be paid, and time when said works are to be completed, and shall be signed by said commissioners, or any three of them," the statute was held directory, the court saying—"the statute says that contracts *shall* be signed by the commissioners or by any three of them. It does not say *they shall be void unless so signed.*"

Cole *vs.* Green, 6 Man. & Gr., 890.

Under an English marriage act requiring consent of parents to marriage, Lord Tenterden held as follows: "The language of this section is merely to *require* consent. It does not proceed to *make the marriage void, if solemnized without consent.*"

Rex *vs.* Birmingham, 8 B. & C., 29.

"When statutes direct certain proceedings to be done in a certain way, or in a certain form, and a strict compliance with these provisions of time or form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed."

Sedgwick on Statutory Law, 368.

This principle is made applicable even to the organic laws of the state.

As, for instance, constitutional directions, that every public act shall be read on three different days, or shall

contain no more than one subject to be expressed in its title, are held to be directory merely.

McPherson *v.* Leonard, 29 Md., 377.
Miller *vs.* State, 3 Ohio State, 483.
Pim *vs.* Nicholson, 6 Ohio State, N. S., 179.

"The provision of the constitution" (of the State of New York) "requiring the question on the final passage of a bill to be taken upon its last reading, and the yeas and nays to be entered on the journal, is only directory to the legislature. *There is no clause directing the act to be void if this direction is not followed.*

People *vs.* Supervisors of Chenango, 4 Seld., 328.

The same principle was applied to a statute of the State of New York, requiring a call of yeas and nays in the common council of New York City.

Striker *vs.* Kelly, 7 Hill, 24.

Second. The prescription of the charter, if regarded as absolutely mandatory, would work the most monstrous frauds and injustice to the public. This is a proper test for determining its construction.

"That some of the provisions of the charter and by-laws" (says Story, J.) "may well be deemed directory to the officers, and not conditions without which these acts would be utterly void, will scarcely be disputed. What are to be deemed such provisions must depend upon the sound construction of the nature and object of each regulation, and of *public convenience* and apparent legislative intention."

Bank of the U. S. *vs.* Dandridge, 12 Wheaton, 81.
See also Delancy *vs.* Insurance Co., 52 N. H., 581.

By the statutes of Pennsylvania, "All marriages shall be solemnized by taking each other for husband and

wife." Held directory: "Many provisions of the act of 1700 and 1729, though doubtless wholesome when they were enacted, are ill adapted to the habits and customs of society as it now exists. It is not too much to say that a rigid execution of them would bastardise a vast majority of the children which have been born within the state for half a century."

Rodebaugh *vs.* Sanks, 2 Watts, 10.

Now, a word in application of this rule to the case in hand:—

If this section is held mandatory, every contract made by these defendants throughout the land, which is not under the seal of the corporation, and signed by the president and attested by the secretary, &c.,—in short, every contract made by every agent, no matter how full his powers, no matter whether in writing or not,—would fall to the ground, leaving the premiums in the treasury of the company, and the assured to bear their own losses. The whole world now trusts to the power of general agents to bind these companies, and the business of insurance is conducted on this assumption.

We beg leave to condense the argument on this point in the language of this very court in another case.

"It is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send their agents all over the land, with directions to solicit and procure applications for policies, furnishing them with

printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies on the agent who has persuaded him to effect insurance, as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right so to regard him?"

Insurance Company *vs.* Wilkinson, 13 Wall, 234.

A provision in a policy so extraordinary as this, might perhaps in its mandatory operation be only a fitting punishment for the people of a State who suffer themselves to be cajoled into enacting it: but this corporation does business in all the States and Territories of the United States, amongst people who are not only ignorant of this anomalous limitation, but practically are beyond the possibility of learning of it, and who could not by any degree of caution be induced to even suspect its existence.

To suffer this company, under these circumstances, to drag out from the archives of Pennsylvania this musty section, and give it a mandatory construction, would be to convert the corporation by judgment of law into a man-trap, a beast of prey in a jungle. The corporation would become, as the learned judge expresses it in the case last above cited, "a snare and a delusion leading, as it has done in numerous instances, to the grossest frauds, of which the insurance companies receive the benefit, and the parties supposing themselves insured, are the victims."

The principal case which tends in a different direction, and the only one worthy of consideration, is Head *vs.* Providence Insurance Co. (2 Cranch, 127). But this case was decided at a very early day, when the rule obtained that a corporation could only contract in writing and under seal, and by a magistrate who held, even at a much later day, that a corporation could only speak in writing, for the very curious reason that it has no voice, and therefore must resort to some substitute for the voice. "I can imagine no other than writing." Per Marshall, dissenting, in Bank *vs.* Dandridge, 12 Wheaton 92. Naturally enough a corporation is incapable of making a parol contract, since it has no "voice." Quære—Has it a pen?

Since the case in Cranch, the law of commercial corporations has deepened and broadened by the relaxation of technicalities, and by the necessities of modern commerce and business. The principle of that case has been maintained, not so the special application of the principle.

In the case in 12 Wheaton, above cited, the court impinged radically upon the ruling in Head *vs.* Providence Insurance Co., greatly to the disgust of the learned Chief Justice; and more recently, not only by the federal court, but by the State courts, that ruling has been disregarded.

In the Commercial Mutual Insurance Co. *vs.* the Union Mutual Co., 19 How., 318, the court held that a statute of the state of Massachusetts, prescribing that insurance companies should make valid policies of insurance only by having them signed by the president and countersigned by the secretary, concerned only the formal mode of signing policies, and had no application to agreements to make insurance.

This decision, though not directly in point, bears obliquely but pertinently upon the question, and evinces,

in a marked manner, the necessity which the court felt itself to be under of construing the requisitions of even a statute law in such a way as to relieve the preliminary contracts of insurance from the rigors of the enactment.

"The notion that a corporation can only act under their corporate seal, and by their president and secretary, has become obsolete. Unless they may be bound by these acts and admissions of their officers and agents acting in the ordinary affairs of the corporation, so far as relates to the business usually transacted by such officers and agents, they would enjoy an immunity incompatible with the rights of individuals and destructive of the objects of their creation. *It is true the charter of the defendants requires their contracts of insurance to be executed in a particular mode; but shall they be permitted, if they adopt a different mode and receive the benefit of the contract, if a loss happens, to insist that their contracts were not in the shape and form requisite,* and in this way escape responsibility, and defraud with impunity those who may choose to contract with them?"

N. E. Fire Ins. Co. *vs.* Schettler, 38 Ill., 171.

In a late Indiana case, the charter of the company provided that its "policies and all other contracts of said company may be made with or without the common seal of the company, and shall be signed by the president and countersigned by the secretary, and, being so signed, shall be obligatory on said company."

In construing the language above recited in application to parol insurance, the court say:

"It is contended that the company, under its charter, could not contract in any other manner than that specified in this section; that their charter, being the enabling act

which alone authorized them to contract, and the sixth section having specified the mode of making contracts of insurance and other contracts, all other modes and forms of making or agreeing to make insurance are necessarily excluded, and hence the parol agreement alleged to have been entered into with Hill was unauthorized and void. It is well settled that corporations must act within the powers conferred by the organic laws under which they are created. This rule is not inconsistent with another, which is, that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executions which a natural person may adopt in the exercise of similar powers. The business of insurance, for example, is not in its nature a corporate franchise. Any person may engage in it, unless forbidden by law, and his contracts of that nature, whether by parol or in writing, will be valid. So when a general authority to engage in that business is given to a corporation in express terms, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories. *It may bind itself in any mode and form of obligation which is not forbidden.* If a private person can agree by parol to make insurance, so can a corporate body, unless the power of thus contracting is plainly denied to it by its organic law."

N. E. Fire and Marine Ins. Co. *vs.* Robinson, 25 Ind., 541.

"Even an express provision in the act of incorporation that policies subscribed by the president and countersigned by the secretary, or however else, shall be binding on the corporation, *merely specifies one sufficient mode of making the contract, and affords no just inference that this mode is exclusive of others*, or that contracts not in writing are invalid.

The ancient stringency of the common law required that corporations should execute their contracts under their

corporate seal, and held that they could only thus contract. But this doctrine is now exploded. And the language of the statutory provision referred to would seem to intend rather to give to the modern doctrine the force of legislative sanction than to preclude such corporation from the right to contract under the corporate seal, if they please, or to designate any particular mode which alone shall be binding upon them."

May on Ins., pp. 14 and 15, §§ 15 and 16.

"An express authority to the company to contract in a certain way *does not exclude the right to contract in any other way* usual with a natural person. To have this effect, there must be in the charter, or other fundamental documents, *express words of exclusion.*"

Bliss on Life Ins., pp. 184–5, § 139.

A similar question arose in the state of New York, on a parol contract of insurance issued by a company whose charter provided "that the policies of insurance and other contracts founded thereon, thereafter to be made or entered into by the said corporation, though not under seal, if subscribed by the president. * * * and countersigned by the secretary, shall be binding and obligatory upon the said corporation, and shall have like force and effect, to all intents and purposes, as if the seal of said corporation had been or was affixed thereto."

The court held "that corporations, along with the express and substantive powers conferred by their charters, take, by implication, all the reasonable modes of execu-

tion which a natural person may adopt in the exercise of similar powers. * * * *It may bind itself in any mode and form of obligation which is not forbidden. If a private person can agree by parol to make insurance, so can a corporate body, unless the power of thus contracting is plainly denied to it by its organic law.*"

Trustees, &c., *vs.* Brooklyn Co., 19 N. Y., 309.

This question has recently come under consideration in the supreme court of the state of Massachusetts, in a case where the defendant's charter provided that "the said corporation in their said name and by the signature of their president, shall have a right to make contracts and underwrite policies of insurance and indemnity against fire," and that learned court reviews the rule and the cases in the following language :—

"The next objection is, that the defendants had no authority to make the oral contract declared on, because they were by their charter authorized only to make contracts by the signature of their president, or of such other person as their rules and by-laws should direct. The case chiefly relied on to support this position is that of Head *vs.* Providence Insurance Co. (2 Cranch, 127). But, while the principle which that case declares, that a corporation, being a mere creature of law, can have no powers but such as are derived from the act which creates it, is undoubtedly a sound one, the application of the principle has been very much modified in other cases.

Bank of Columbia, *vs.* Patterson, 7 Cranch, 299.

Mechanics' Bank *vs.* Bank of Columbia, 5 Wheaton, 326.

Bank of U. S. *vs.* Dandridge, 12 Wheaton, 69.

New England Marine Ins. Co. *vs.* DeWolf, 8 Pick., 56.

Foster *vs.* Essex Bank, 17 Mass., 497.
Taylor *vs.* Merchants Fire Ins. Co., 9 How., 390.
Commercial Ins. Co. *vs.* Union Ins. Co., 19 How., 318.

We can not think that a provision in the charter of an insurance company, authorizing contracts authenticated by the signature of a particular officer, *and without any words of restriction*, should generally be construed to limit the powers of the company, and to prevent them from making contracts within the ordinary scope of their chartered powers. On the contrary, the phraseology of those statutes respecting the execution of policies should be regarded as consisting simply of enabling words, not restraining the power which they confer to make contracts, of which the policies are the evidence,—19 Howard, 321, before cited."

Sanborn *vs.* Fireman's Insurance Co., 16 Gray, 448.

In a recent insurance case in England, arising under a registered deed of organization upon a policy of life insurance not executed according to the requirements of the twentieth section of the deed, Lord Campbell, giving the opinion of the court, holds the following language:

"We must bear in mind that there are *no nullifying words in the twentieth section of the deed of settlement, and that they may well be considered as directory, instead of creating by implication a condition precedent which might work such enormous injustice.* * * * * Therefore we are of opinion that, according to the sound principles of law and the just construction of the statute, if there had been a clause in the deed of settlement pro-

hibiting the directors from executing any deed unless the deed be engrossed on vellum, and an action were brought against the company on a deed proved to be under the seal of the company and not liable to any other objection, the defendant would not be entitled to a verdict under a plea of *non est factum*, on proof that the deed was engrossed on parchment instead of vellum."

Prince of Wales Ass. Co. *vs.* Harding, 1 E. B. & E., 216-20.

It may therefore be asserted, as the result of all well-considered modern authorities, that the language of an insurance charter, prescribing the forms of insurance contracts, shall be held to be directory, unless there be found some express language of exclusion, as in the case of Couch *vs.* City Fire Insurance Co., 38 Conn., where the contract is, in express terms, declared to be void.

(II.)—*The language under construction, even if held mandatory, is applicable only to executed contracts or policies of insurance, and not to preliminary agreements to make insurance or issue a policy.*

These latter always precede the former, are an indispensable means to the former, and are therefore implied. The policy, when issued as the formal and final memorial of the contract, is to bear the required official attestation. But, as preliminary and incidental to this, the company may, by its agents, stipulate as to the terms on which the policy shall issue, and are liable on such stipulations.

In a recent case in Kentucky, on a parol contract made by a company whose charter provided "that all policies

or contracts of insurance which may be made or entered into by the said corporation, shall be subscribed by the president and signed and attested by the secretary, and being so signed and attested, shall be binding and obligatory on the said corporation without the seal thereof, according to the tenor, extent and meaning of such policies or contract, the court, commenting on the language of said section, holds the following:

"*All policies or contracts of insurance import executed insurances, and not executory contracts for policies or for insurance. Such initial contracts for insurance by policy are generally made by agents, and neither could be conveniently, nor, so far as we know, ever have been signed by the president and secretary. The policy, in whatever form, is so signed.*"

Security Fire Ins. Co. *vs.* Kentucky Marine Co. 7 Bush, 88.

But more recently, in 1861, the very question now at bar arose before Judge Grier, on the Pennsylvania circuit. The question was upon the validity of a parol contract by an insurance company, made in Pennsylvania.

The statute of that state empowered insurance companies "to make, execute, and perfect such contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case may require, and every such contract, bargain, policy, and other agreement shall be in writing or print, under the corporate seal, and signed by the president, or, in his inability, by the vice-president."

This language, it will be seen, is almost in *totidem verbis* with the eighth section of the plaintiff's charter, the only difference being favorable to defendant's claims.

The learned Judge says: "By its act of incorporation, this company could make insurance which would be legally valid only by a policy attested by the president, secretary, and the seal of the corporation. *Yet, before such instruments are attested in due form, the president or secretary, or whoever else may act as a general agent of the company, may make agreements, and even parol promises, as to the terms on which a policy shall be issued,* so that a court of equity will compel the company to execute the contract specifically; and where the loss has happened, to avoid circuity of action, the Chancellor will enter a decree directly for the amount of the insurance for which the company ought to have delivered their policy, properly attested."

Constant *vs.* Alleghany Co., 1 Am. Law Reg., N. S., 116.

This is equivalent to holding that the language in question does not exclude or forbid these preliminary stipulations; for, if otherwise, the contract would be void, and, in consequence, could no more be enforced in equity than at law.

Now, if the contract may be enforced in equity, it may also be enforced at law.

McCullough *vs.* Eagle Insurance Co., 1 Pick., 280.
Hamilton *vs.* Lycoming Insurance Co., 5 Barr, 342.
Mobile Dock *vs.* McMillan, 31 Ala., 711.
Taylor *vs.* Merchants Insurance Co., 9 How., 405.
Audubon *vs.* Excelsior Co., 27 N. Y., 216.
Pratt *vs.* Hudson R. R. Co., 21 N. Y., 314.
Lightbody *vs.* N. A. Insurance Co., 23 Wend., 24.

The decision of Judge Grier, therefore, if accepted as law, concludes the question under discussion.

Now in the case at bar, a policy was actually executed by the company in pursuance of the preliminary contract.

A policy once executed, though not delivered, is a voluntary specific performance, and trover will lie for its value.

Kohne *vs.* N. A. Insurance Co., 1 Wash. C. C., 93.
Phillips on Insurance, §1992.
Park on Insurance, 4.
Marshall on Insurance, 303.
May on Insurance, § 45,
Bliss on Insurance, § 160.

The assured may sue on the policy, even though the possession be wrongfully withheld by the assurer.

Sheldon *vs.* Conn. Mutual Co., 25 Conn., 207.
Fried *vs.* Royal Ins. Co., 47 Barb., 127.

In the first-named case, a policy had been duly executed and was in the hands of the agent, but had never been in the possession of the assured, nor even offered to him. The court held that suit might be maintained on the policy, even though the agent had returned the policy to the home office, and the president had erased his signature.

And in the last-named case a policy had been executed and sent to the agent, in conformity to a parol contract with the agent, but had never been delivered in fact: on the other hand, the agent had refused, on request made by the assured to deliver it. Held that the contract was fully consummated, and that the facts constituted all the delivery required.

To the same point are—

Kentucky Mutual Ins. Co. *vs.* Jenks, 5 Ind., 96.
Davenport *vs.* Peoria Ins. Co., 17 Iowa, 276.
Hallock *vs.* Com. Ins. Co., 2 Dutch, 268.
Bragdon *vs.* Appleton Ins. Co., 42 Me., 259.

III.

THAT THE POLICY WAS NOT EXECUTED TILL AFTER THE LOSS, AND WAS NEVER DELIVERED.

To which we reply—

(1.) The agent was authorized to do after the fire that which before the fire he had obligated the company to do. The case finds that at the time of the parol contract it was agreed by the agents "that a policy should be made, and that Nevers & Havens should keep the policy in their possession for the plaintiff till October 1st, for the convenience of the plaintiff, he claiming that he had then no safe and convenient place in which to keep papers of that character."

Lightbody *vs.* N. A. Ins. Co., 23 Wend., 18.
Perkins *vs.* Washington, 4 Cow., 661.
Fried *vs.* Royal Ins. Co., 47 Barb., 127.
De Camp *vs.* N. J. M. L. Ins. Co., Ins. Law, J., vol. 3, No. 2, p. 91.

(2.) The policy once executed by the agents was held by them under their express agreement for the insured as his property, and need no other delivery to perfect the title of the insured thereto.

We submit, therefore, in conclusion, that there is no error in the court below, and that judgment should be rendered accordingly.

HENRY C. ROBINSON,
R. D. HUBDARD,
Of Counsel for Defendant.



We submit, therefore, in conclusion, that there is no error in the court below, and that judgment should be rendered accordingly.

HENRY C. ROBINSON,
R. D. HUBBARD,
Of Counsel for Defendant.



20-560

FRANKLIN FIRE INSURANCE CO.,

Plaintiffs in Error,

vs.

SAMUEL C. COLT.

Supreme Court of United States.

BRIEF OF PLAINTIFFS IN ERROR.

HARTFORD, CONN.:
THE CASE, LOCKWOOD & BRAINARD CO., PRINTERS.
1874.

FRANKLIN FIRE INSURANCE COMPANY,

PLAINTIFFS IN ERROR,

vs.

SAMUEL C. COLT.

BRIEF OF PLAINTIFFS IN ERROR.

The plaintiffs are a Fire Insurance Company, chartered by the Legislature of the State of Pennsylvania, and at the time of the transactions referred to in the record, were doing business in the State of Connecticut.

Nevers & Havens were at said time agents of said company for the City of Hartford and its vicinity, with powers as set forth in exceptions. (2d clause of ex.: case, p. 11.)

On the 26th day of August, 1870, there was completed (see bill of exceptions, p. 11) a parol contract of insurance with said Nevers & Havens and Samuel C. Colt to insure certain property for the term of five years from said date, the insurance to be binding on and from that date.

Credit was given for the payment of the premium till the first of October then next, and it was agreed that a policy should be made, that Nevers & Havens should keep the policy in their possession for said Colt till the first of October for his convenience.

See record, p. 11.

The property was destroyed by fire on the 20th day of September, 1870.

The policy was not made until after the fire and the company had no knowledge of any negotiations, or of the contract to insure, until after the fire (except the knowledge of these agents).

The company was specially empowered to "make insurance against losses by fire, &c., in and by its charter, and it is also explicitly provided therein that "every contract, bargain, agreement, policy, and other instrument to be made by said corporation," for the insurance of property, "*shall be in writing or in print.*"

Defendant's charter, sec. 8. Record, page 14.

The main question raised by the exceptions is: had Nevers & Havens power, under the charter of the company, to bind them by the parol agreement of 26th of August?

The plaintiff in error relies upon each and all of the propositions, proposed as instructions for the jury and stated as follows upon the 12th page of the record:

1st. "That the 8th section of the defendant's charter prescribed the manner in which every contract, bargain, and agreement of insurance should be made, and that no contract having been made in writing or print, and executed as therein required, during the existence of the property claimed to have been insured, the defendants are not liable in the action."

2d. "That under and by virtue of the charter of the defendants, the defendants are not authorized to make a parol contract of insurance, and that such contract is void at law."

3d. "That under the charter of the defendants, an action at law cannot be sustained against said company, upon a parol agreement to insure, or a parol contract of insurance."

4th. "That it being a fact in this case, and admitted by the plaintiff, that the parol contract was not executed or evidenced by a written policy until after the destruction of the property by fire, the defendant's agents had no authority subsequent to the fire, to make and execute a written policy, which should be binding upon the defendants."

"All persons dealing with a corporation (even a foreign one) are bound to take notice of every limitation upon its powers, contained in its charter."

Hoyt *vs.* Thompson, 19 N. Y., 222.

a contract and it can contract only in the mode and manner prescribed in its charter. The act of incorporation is an enabling act. It gives to the corporation all the power it possesses; it enables them to contract, and *when it prescribes to them a form of contracting they must observe the mode or the instrument no more creates a contract than if the body had never been incorporated.*"

We cite the following cases in which the doctrine is expressly stated and held by the Supreme Court of Connecticut; and several of the more leading and important among the insurance cases in the Federal Courts and Courts of other States:

Head *vs.* Prov. Ins. Co., 2d Cranch, 166, 7. (Opinion by Ch. J. Marshal.)
New York Fireman's Ins. Co. *vs.* Ely, 5 Conn., 568.
Catlin *vs.* Eagle Bank, 6 Conn., 240.
Berlin *vs.* New Britain, 9 Conn., 180.
Hood *vs.* N. Y. & N. H. R. R. Co., 22 Conn., 17-18, 508.
Mut. Sav. Bank, &c., *vs.* Meriden Agt. Co., 24 Conn., 163-4.
Couch *vs.* City Fire Insurance Co., 38 Conn., 187.
Bank of Augusta *vs.* Earle, 13 Peters, 587.
Bank of U. S. *vs.* Dundridge, 12 Wheat., 69.

The policy was not made until after the fire and the company had no knowledge of any negotiations, or of the contract to insure, until after the fire (except the knowledge of these agents).

Defendant's charter, sec. 8. Record, page 14.

The main question raised by the exceptions is: had Nevers & Havens power, under the charter of the company, to bind them by the parol agreement of 26th of August?

The plaintiff in error relies upon each and all of the propositions, proposed as instructions for the jury and stated as follows upon the 12th page of the record:

1st. "That the 8th section of the defendant's charter prescribed the manner in which every contract, bargain, and agreement of insurance should be made, and that no contract having been made in writing or print, and executed as therein required, during the existence of the property claimed to have been insured, the defendants are not liable in the action."

2d. "That under and by virtue of the charter of the defendants, the defendants are not authorized to make a parol contract of insurance, and that such contract is void at law."

3d. "That under the charter of the defendants, an action at law cannot be sustained against said company, upon a parol agreement to insure, or a parol contract of insurance."

4th. "That it being a fact in this case, and admitted by the plaintiff, that the parol contract was not executed or evidenced by a written policy until after the destruction of the property by fire, the defendant's agents had no authority subsequent to the fire, to make and execute a written policy, which should be binding upon the defendants."

In support of these propositions, we say:

1st. That "A corporation has no inherent power to make a contract and it can contract only in the mode and manner prescribed in its charter. The act of incorporation is an enabling act. It gives to the corporation all the power it possesses; it enables them to contract, and *when it prescribes to them a form of contracting they must observe the mode or the instrument no more creates a contract than if the body had never been incorporated.*"

We cite the following cases in which the doctrine is expressly stated and held by the Supreme Court of Connecticut; and several of the more leading and important among the insurance cases in the Federal Courts and Courts of other States:

Head *vs.* Prov. Ins. Co., 2d Cranch, 166, 7. (Opinion by Ch. J. Marshal.)
New York Fireman's Ins. Co. *vs.* Ely, 5 Conn., 568.
Catlin *vs.* Eagle Bank, 6 Conn., 240.
Berlin *vs.* New Britain, 9 Conn., 180.
Hood *vs.* N. Y. & N. H. R. R. Co., 22 Conn., 17-18, 508.
Mut. Sav. Bank, &c., *vs.* Meriden Agt. Co., 24 Conn., 163-4.
Couch *vs.* City Fire Insurance Co., 38 Conn., 187.
Bank of Augusta *vs.* Earle, 13 Peters, 587.
Bank of U. S. *vs.* Dundridge, 12 Wheat., 69.

Walker *vs.* Metropolitan Ins. Co., 56 Maine, 371.
Conn. Mutual Ins. Co. *vs.* Md. Ins. Co., 19 Howard, 321.

Mr. Phillips in 1. Phil. on Ins. page 10, says: An incorporated insurance company "is the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporated act has made it, to derive all its powers from that act and to be capable of exercising them *only in the manner which that act authorizes.*

"In contracting with such a body it is necessary not only to see that the contract is one which is within its authority to make, and that the person acting as the agent of the company, is authorized to bind it, but also that the contract is in a form by which the company, *according to its constitution*, may be bound."

The language of the 8th, (the enabling section) of the charter in question is as follows:

"That the president and directors shall have full power, in behalf of said corporation, to make insurance against losses by fire on any house, &c., and to make, execute and perfect such and so many contracts, bargains, agreements, policies, and other instruments, as shall or may be necessary, and as the nature of the case shall or may require; *and every such contract, bargain, agreement, and policy to be made by said corporation shall be in writing, or in print;* and shall be under the seal of the said corporation, signed by the president, and attested and signed by the secretary, or other officers, who may be appointed by the president and directors for that purpose."

2d. While it may be true, as a general rule, that valid contracts of insurance may be made by parol; this charter carefully and directly limits the powers of the company to written "contracts," &c.

It prescribes not only what kinds of property may be insured, but directs in very clear terms the manner and mode in which the contract shall be executed and evidenced.

There is no hardship in such a requirement. The considerations of public policy which require other important contracts to be in writing, justify the same limitations in regard to the contract of insurance.

The present case sufficiently shows the importance of having an insurance contract clearly made and accurately expressed and vindicates the necessity of the charter requirement.

Disputes as to the authority of agents of insurance companies are among the most fertile sources of litigation in insurance cases.

It is therefore wise legislation which seeks to mitigate the evil by requiring as far as possible, consistently with the exigencies of the business, that the terms of the contract be put in writing.

Hence provisions requiring policies to be in writing have been incorporated into many statutes, public and private, in many States.

Did the Legislature, while insisting upon certain formalities in the execution of a policy, intend to permit so simple a mode of evasion as the substitution of an informal but binding parol agreement in place of the written contract called for, and thus sweep away every formality required?

3d. It must be admitted that if the corporation is *limited* by the enabling act to a particular mode of constructing that mode must be adopted, but it is denied that there is any *re-*

striction in this charter, and claimed that the manner or form prescribed is not exclusive but concurrent with unexpressed methods and that the words indicating what method shall be adopted are not mandatory but directory.

We admit that no exact rule can be laid down by which a court can always declare a particular expression in a charter or statute to be mandatory or directory. The court must sometimes judge the intent of the Legislature from the importance of the subject matter and from the strength of the language which the Legislature has used.

Dundridge *vs.* U. S. Bank, 12 Wheat., 64. See also the able and vigorous dissenting opinion of Ch. J. Marshall, pp. 90 and *on*, including recital of case of Head *vs.* Provident Co., on pages 98-100. This case is often quoted as weakening the authority of Head *vs.* Provident Ins. Co., but we submit that it is rather in favor of the principles laid down in that case.

See especially, remarks of Story J. as to Head's Case on page 69.

In the charter of the plaintiff the language is as mandatory and vehement as it is possible for a draftsman to frame, unless he had also added negative words and prohibited any other form.

The phraseology certainly implies a prohibition of any contract unless in writing or in print.

The contracts required to be in writing are those for which the company was created—the most important which they can make. Certainty and exactness in these contracts was important *for the corporation and for the public.*

It is true that where the requirement to make written contracts is less broad and comprehensive than here, courts have decided that parol agreements could be enforced in equity and perhaps at law.

Thus, by force of a statute in certain States, or of a charter in other cases, some insurance corporations can make valid *policies* of insurance only by having them signed by the president.

It has been held that this provision only applies to the mode in which *policies* should be made and has no application to other agreements or contracts of insurance.

That when a *formal policy* is to be made, *it must be made in the statute or charter form*, but a valid agreement in regard to insurance can be entered into by parol.

Walker *vs.* Metropolitan Ins. Co., 56 Maine, 371.
Com. Mut. Ma. Ins. Co. *vs.* Union Mut. Ins. Co., 19 Howard, 318.

But the provisions in this charter are plainly distinguishable from the provisions in that class of cases.

The 8th section specially declares and requires that "every such *contract*, *bargain*, *agreement*, and *policy* shall be in writing or in print." This broad and apparently mandatory declaration is very different from the restricted language of the charters or statutes which are construed in the cases cited and in other cases of the same character, of which the First Baptist Church *vs.* Brooklyn Fire Ins. Co., 19 N. Y. Rep., 305, is also an example.

We find no case where the phraseology is as broad and comprehensive as this charter, and where the intent of the Legislature is so clearly defined and obvious, in which the courts have held the manner prescribed to be concurrent with unprescribed forms.

Every completed "contract, bargain and agreement" is by this section as clearly and positively inhibited as were "policies" in the case referred to.

It may be claimed that the first half of the 8th section gives the corporation power to insure against losses by fire upon all classes of property, and that such power to insure having been granted, they can insure by parol or in any method; the method being simply incidental to the exercise of the main power.

In reply, we say, that while it is in general true that an incidental power may be exercised in any manner in which a corporation can be bound; yet that whenever a charter *expresses and limits* the mode, it must be followed; and the corporation can only contract *according to the terms* of the special act which created and controls them.

"A public company created under act of Parliament, cannot generally contract except in the mode and upon the conditions specified in the special act or in the general act to which it is subject. It is not necessary for the existence of the right, that the charter of a company should confer the power of contracting upon an agent, but when the charter prescribes a *mode* in which agents must act, that mode must be *strictly pursued*, to render their acts binding on the company.

Homersham *vs.* Wolverhampton Water Works Co., 4 Eng. Law and Eq., 429.

Williams *vs.* Chester & Holyhead Railway, 5 Eng. Law and Eq., 497, 503.

It may be true that this corporation might enter by parol into preliminary negotiations looking to a contract and before it could be reduced to writing the property might be destroyed. In such case facts might exist upon proof of which the insured would be equitably entitled to his insurance. But in such case the remedy (as Judge Grier suggests in Constant's

case would be equitable) to compel the company to execute and deliver a policy but no action at law could be sustained upon the parol negotiations.

Constant *vs.* Allegheny Ins. Co., 10 Am. L. R., 116, (N. S.)

4. The parol contract not being executed or evidenced by writing, until after the destruction of the property by fire, the company's agents had no authority subsequent to the fire, to make and execute a written policy which should be binding upon the company. Such policy could only take effect as *evidence* of a *prior*, *valid* parol contract.

The policy was not an insurance of existing property.

If a valid contract had been made prior to the fire, a policy though executed after the fire, might have taken effect by relation to the date of the contract.

But the insurance was effected by a parol contract which was void, and the policy was delivered after the agent and the insured had knowledge that the property was destroyed.

A policy issued after the fire is of no value unless there had been a previous valid parol contract of insurance.

Bently *vs.* Columbian Fire Ins. Co., 17 N. Y., 421.

Finally, the power of an officer or agent of a corporation to perform any act that shall bind the corporation must come from one of these sources :

1st. From the charter *directly*.

2d. From the charter *indirectly*.

3d. From usage which should work an estoppel upon the corporation.

There can be no claim of power derived directly from the charter or from usage.

And it is clear that there can be no power derived indirectly for the only section (the 8th) which authorizes contracts or policies of insurance specifically and exactly prescribes the mode and manner in which such contract shall be executed.

F. CHAMBERLIN,

Of Counsel for Plaintiff in Error.

